UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

VOLVO GROUP NORTH AMERICA, LLC and WALTER EVANS, an Individual	Cases 15-CA-179071 15-CA-184912 15-CA-195183 15-CA-204842

RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

NOW COMES Respondent, Volvo Group North America, LLC, and files its Exceptions to Administrative Law Judge's Decision,[1] as follows:

Respondent takes exception to the Administrative Law Judge's ("ALJ's):

1. Finding and/or conclusion that:

> In a third-step meeting on June 30, 2016, regarding Evans' May 2016 suspension and discharge, Hayes confirmed that she investigated Evans' claim that others were in the break room with him. Hayes not only confirmed that 8 others were in the break room, she also confirmed that Evans was the only person who received discipline. (Tr. 281–282; GC Exh. 36 at 352.) Despite this revelation, Respondent took no action to change Evans' discipline. (Tr.282.) Nor does Respondent show any of the others received coachings or other forms of discipline

on the grounds that the finding and/or conclusion is not supported by the record evidence, is based on a patent misreading of the minutes of the meeting, and is erroneous as a matter of law. (JD 18: 30-36).

[1] References to the ALJ's decision are designated as "JD" followed by the appropriate page and line number(s). Citations to the supporting record evidence and supporting legal argument are set forth in Respondent's Brief in Support of Exceptions, which is being filed simultaneously with its Exceptions.

2. Finding and/or conclusion that the ALJ would "discredit much of Braggs' testimony, which was contradicted by himself or others," on the grounds that the finding and or conclusion is not supported by the record evidence, is based on a misinterpretation of the record, and is erroneous as a matter of law. (JD 19: 46).

3. Finding and/or conclusion that Braggs was contradicted by others in the following regard: "He also reported that Evans was alone, when both Respondent's and Union's subsequent investigations revealed eight other workers were in the break room with Evans," on the grounds that the finding and/or conclusion is not supported by the record evidence, is based on a patent misreading of the record, and is erroneous as a matter of law. (JD 20: 9-11).

4. Finding and/or conclusion that

> Hayes' report on June 30 confirms that others were in the break room with Evans and that Braggs therefore is discredited that no one else was with him when he saw Evans in the break room. With the corroborating evidence and the bargaining notes from Hayes, I credit that Evans was not in the break room alone.

on the grounds that the finding and/or conclusion is not supported by the record evidence, is based on a patent misreading of the record, and is erroneous as a matter of law. (JD 21: 1-5).

5. Finding and/or conclusion implying that Bush testified that at the second step grievance meeting, the Union provided a list of other employees in the breakroom at the same time as Evans, on the grounds that the record clearly establishes that this did not occur until June 30, 2016, at a grievance meeting regarding Evans' subsequent suspension and termination. (Tr. 1082; GC-36).

6. Finding and/or conclusion that "Thomas admitted adverse information about Respondent's failure to act upon learning that Evans was the only person disciplined while others were present in the break room" and the ALJ's crediting of testimony about such alleged information that did not exist, on the grounds that the finding and/or conclusion is not

supported by the record evidence, is based on a patent misreading of the record, and is erroneous as a matter of law. (JD 21: 19-21).

7. Finding and/or conclusion that "General Counsel presents a prima facie case," on the grounds that the finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 22: 30).

8. Finding and/or conclusion that Evans engaged in protected concerted activity by "invok[ing] the rights provided by the collective-bargaining agreement in meetings with other employees," on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 22: 31-35).

9. Finding and/or conclusion that "Buckingham's concerns about Evans interruptions and 'cutting up' show knowledge and animus," on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 22: 37-38).

10. Finding and/or conclusion that "Respondent's annoyance with Evans does not mean he did not present concerns rooted in the collective-bargaining agreement," on the grounds that this finding and/or conclusion shifts the burden of proof from General Counsel to Respondent. (JD 22: 38-39).

11. Finding and/or conclusion

> Respondent failed to conduct a meaningful investigation before issuing discipline to Evans. Respondent initially failed to investigate the allegation that others were in the break room and received no discipline. Respondent blindly went forward with the discipline, even after it discovered Evans was not the only person in the break room early but was the only one who received discipline. Respondent let the discipline stand and took no action to step back from the written warning. Respondent refused to correct its error, showing discriminatory intent

on the grounds that this finding and/or conclusion is not supported by the record evidence, is based on a patent misreading of the record, and is erroneous as a matter of law. (JD 22: 45-50).

12. Finding and/or conclusion that "If Buckingham's animus towards Evans was not enough by itself, this chain of events demonstrates disparate treatment," on the grounds that this finding and/or conclusion is not supported by the record evidence, is based on a patent misreading of the record, and is erroneous as a matter of law. (JD 23: 1-2).

13. Finding and or conclusion that

> In applying the law of "blatant" disparity here, Evans received discipline while eight others received no discipline or counseling. This disparity is obvious and conspicuous, leading to the conclusion that animus led to Respondent's decision to discipline Evans. Respondent, having uncovered exculpatory evidence, decidedly ignored it.

on the grounds that this finding and/or conclusion is not supported by the record evidence, is based on a patent misreading of the record, and is erroneous as a matter of law. (JD 23: 23-26).

14. Finding and/or conclusion that "Based upon Evans' activities in support of the collective-bargaining agreement, Respondent's knowledge of those activities, and animus evident through disparate treatment, poor investigation and Buckingham's statements, General Counsel presents a strong prima facie case," on the grounds that this finding and/or conclusion is not supported by the record evidence, is based on a patent misreading of the record, and is erroneous as a matter of law. (JD 23: 31-34).

15. Finding and/or conclusion that

> However, what triggered the review was Braggs' report that Evans was in the break room early. Braggs reported the incident before break shortly after 2 a.m., and the break was over at 2:30 a.m. Respondent still relied upon the early break for the discipline and Bush did not raise the issue of unexplained gap times of March 11 until the grievance meeting, which constitutes a shifting defense

on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 23: 42-46).

16. Finding and/or conclusion that "Respondent cannot rely upon only one prong of the disciplinary action, the claimed delay in working after the break, when it did nothing to remove the discipline it knew to be incorrect and disparate," on the grounds that this finding and/or conclusion is not supported by the record evidence, is based on a patent misreading of the record, and is erroneous as a matter of law. (JD 23: 49-51).

17. Finding and/or conclusion that "Respondent's reliance on a false reason for the written warning was pretextual," on the grounds that this finding and/or conclusion is not supported by the record evidence, is based on a patent misreading of the record, and is erroneous as a matter of law. (JD 23: 50; JD 24: 1).

18. Finding and/or conclusion that "Respondent therefore violated Section 8(a)(3) and (1) by giving Evans a written warning for taking his break early and allegedly wasting time," on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 24: 3-4).

19. Finding and/or conclusion that Respondent treated Evans disparately by disciplining him for dropping windshields, on the grounds that this finding and/or conclusion is not supported by the record evidence, resulted from a wrongly placed burden of showing the absence of disparate treatment on the Respondent, is not supported by the record evidence, and is erroneous as a matter of law. (JD 28: 4-25).

20. Finding and/or conclusion that "General Counsel presents a strong prima facie case" with respect to the suspension for tipping crates on the grounds that this finding and/or

conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 31: 44-46).

21. Finding and/or conclusion that Thompson used the term "disruptive behavior" as a "euphemism" for Evans's activities with "a connotation for disliked union activities or "a code word for unhappiness with the employees' propensity to talk to other people and to stir other employees and to, essentially, try to get them interested in discussing the working conditions . . .," on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 32: 3-6).

22. Finding and/or conclusion that "Respondent seized upon the [tipping crates] incident to send Evans further down the progressive disciplinary path," on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 32: 11-12).

23. Finding and/or conclusion that Respondent "relied upon a prior unlawful disciplinary action, which it knew to be incorrect" and that "[r]elying upon a prior unlawful discipline taints the subsequent disciplinary action," on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 32: 12-13).

24. Finding and/or conclusion that the original but removed 30-day suspension "discipline was inconsistent with Respondent's past practice in which it did not discipline for tipping or dropping crates; this failure also raises an inference of discriminatory motive," on the grounds that the finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 32: 16-18).

25. Finding and/or conclusion that "General Counsel has developed a strong prima facie case, "on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 32: 18-19).

26. Finding and/or conclusion that "Worse, apparently no one in Byhalia heeded Youngdale's sage advice to ensure Respondent gave discipline consistently for this offense" and "that Respondent's 30-day suspension for tipping over crates was pretextual, particularly because Respondent treated Evans disparately and gave disciplinary action when its investigation was obviously insufficient," on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 32: 21-25).

27. Finding and/or conclusion that "Respondent violated Section 8(a)(3) and (1) by issuing the 30-day suspension" on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 32: 25).

28. Conclusion that Evans' initial termination for making threats should be analyzed under an *Atlantic Steel* analysis, on the grounds that the threats were not made in the context of Evans engaging in otherwise protected concerted activity, and the issue called for a *Wright Line* analysis. (JD 32: 32-33). [2]

29. Finding and/or conclusion that the fourth *Atlantic Steel* factor favors protection as the outburst was in response to an unfair labor practice, on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 34: 30-37).

[2] Exceptions 28 and 29 are conditional on the General Counsel filing exceptions to the Judge's dismissal of the allegations regarding Evans' initial termination for threatening a manager.

30. Finding and/or conclusion that there was no need to perform an *Independent Stave* analysis because the p arties did not intend to settle the unfair labor practice issue, did not address the unfair labor practice issue, and the Union did not consult Evans, on the ground that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 34: 43-51; JD 35: 1-30).

31. Finding and/or conclusion that deferral to the grievance settlement is inappropriate, on the ground that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 35: 27-30).

32. Finding and/or conclusion that the ALJ would "not credit Bush that he did not see employees backing out of aisles before this incident with Evans," on the ground that this finding and/or conclusion is not supported by the record evidence, is based on nothing more than surmise or speculation, and is erroneous as a matter of law. (JD 43: 5-8).

33. Finding and/or conclusion that Respondent, by terminating Evans, violated Section 8(a)(3) on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 43: 12).

34. Finding and/or conclusion that "Respondent is tasked with knowledge and animus of its supervisors, on the ground that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 43: 25).

35. Finding and/or conclusion that "Timing points towards animus as the termination was 4 days after Evans spoke out at the meeting" on the grounds that this finding/and/or conclusion is not supported by the record evidence, is not logical or reasonable given the record evidence and is erroneous as a matter of law. (JD 43:27-28).

36. Finding and/or conclusion that "The termination, claimed to rely upon the progressive disciplinary system, also 'stands on the shoulders' of prior unlawful discipline, which had not yet been removed from Evans' record," on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 43: 28-30).

37. Finding and/or conclusion that "As to the disciplinary actions for backing out of aisles after Evans' termination, Respondent's actions smack of trying to close the barn door after the cows are let out," on the grounds that this finding and/or conclusion is not supported by the record evidence, and is erroneous as a matter of law. (JD 43: 30-31).

38. Finding and/or conclusion that "[t]hese factors also demonstrate animus," on the grounds that this finding and/or conclusion is not supported by the record evidence, and is erroneous as a matter of law. (JD 43: 31-32).

39. Finding and/or conclusion that a *Babcock & Wilcox* standard for the issue of post-arbitration deferral should be applied to the arbitration award and that deferral was inappropriate, based on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 45: 17-25).

40. Finding and/or conclusion that the third *Babcock* prong precludes deferral because the collective bargaining agreement did not permit the arbitrator to consider the unfair labor practice, on the ground that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 45: 19-21).

41. Finding and/or conclusion that a *Spielberg/Olin* standard for the issue of post-arbitration deferral should not be applied on the grounds that the Board should overrule *Babcock* and return to the longstanding *Spielberg/Olin* standard (JD 45: 25-26).

42. Finding and/or conclusion that "Even earlier deferral cases would find the remedy here [in the arbitration] repugnant to the Act as the correct remedy here would require Evans to be reinstated and made whole," on the grounds that this finding and/or conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 45: 49-50).

43. Failure to find and conclude that the grievance settlement placed Evans, by agreement of the Respondent and Union and with acceptance by Evans, at the fourth step of the progressive discipline under the applicable collective bargaining agreement and that the arbitrator correctly found that the Respondent issued Evans the fifth step, termination of employment, for violating a safety rule by backing out, on the grounds that the record establishes this fact and is required as a matter of law. (JD: 45 30-45; JD 46: 1-15).

44. Conclusions of Law paragraphs 4 and 5, on the grounds that these Conclusions are not supported by the record evidence and are erroneous as a matter of law." (JD 46: 4-13).

45. Remedy, on the grounds that no unfair labor practice was established. (JD 46: 19-50).

46. Order, on the grounds that no unfair labor practice was established. (JD 47: 1-49; JD 48: 1-3).

47. Notice to Employees, on the grounds that no unfair labor practice was established. (JD APPENDIX).

Respectfully submitted this 18th day of June 2019.

/s/ Charles P. Roberts III

CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
100 North Cherry Street, Suite 300
Winston-Salem, NC 27101
336.721.6852 (T)
336.283.0380 (F)
croberts@constangy.com

CERTIFICATE OF SERVICE

I certify that this day, I served the foregoing EXCEPTIONS on the following parties of record by electronic mail:

William T. Hearne
Counsel for the General Counsel
National Labor Relations Board
Subregion 26
80 Monroe Avenue, Suite 350
Memphis, TN 38103
Ph. (901) 425-7232
William.Hearne@nlrb.gov

Walter Evans
875 West Poplar Avenue #115
Collierville, TN 38017
evanscwalt@aol.com

Dated this 18th day of June, 2019

/s/Charles P. Roberts III
Constangy, Brooks, Smith & Prophete LLP,
100 N. Cherry Street
Suite 300
Winston-Salem, NC 27101-4016
(336) 721-6852
(336) 748-9112 (F)
croberts@constangy.com